Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
High-Cost Universal Service Support	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link Up	WC Docket No. 03-109
Universal Service Contribution Methodology	WC Docket No. 06-122
Numbering Resource Optimization	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68
IP-Enabled Services	WC Docket No. 04-36
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135

JOINT REPLY COMMENTS OF PAETEC COMMUNICATIONS, INC., CITYNET, LLC, GRANITE TELECOMMUNICATIONS, INC., RCN TELECOM SERVICES, INC. AND U.S. TELEPACIFIC CORP.

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Summary

The Commission should not waste this historic opportunity to reach consensus on intercarrier compensation reform. It should eliminate the artificial and irrational distinctions between classes of carriers and traffic touching the Public Switched Telephone Network ("PSTN"). But the Commission should not and cannot mandate immediate and drastic cuts in current rate levels. Assuming an end point of $0.0007 per minute of use, the Proposals could result in a $9.9 billion reduction in intercarrier compensation revenues industry-wide. After raising their subscriber line charges to recoup some of these losses, if all incumbent local exchange carriers are permitted to recover the remaining lost access revenue, the federal Universal Service Fund could increase by $5.1 billion annually, which would have to be funded by a per subscriber USF fee increase of $1.06. These figures confirm that the Commission must exercise extreme caution in mandating the pace of rate reductions and "picking" the final uniform rate. In these reply comments, Joint Commenters address the steps the Commission should take to begin the transition to a rational system of intercarrier compensation that will put the industry on sound footing for the transition to an IP-based PSTN and further competition in all markets.

First, assuming it can overcome the hurdle of Section 2(b) which reserves intrastate matters to state commissions, the Commission should affirm that all terminating telecommunications traffic should be compensated under Section 251(b)(5) at the end of the transition.

Second, the Commission should adopt a standstill period of two years to let carriers adjust their business plans and state commissions complete proceedings to determine how to transition terminating intrastate access rates to lower, cost-based levels. The FCC should also make clear that any attempt through self-help to force LECs to accelerate the transition to lower

rates will be dealt with swiftly and punished by forfeitures designed to deter such anti-competitive conduct.

Third, the Commission should affirm the respective roles of federal and state regulators. The FCC should adopt national rules that require all telecommunications to be compensated under Section 251(b)(5) by a date certain but permit state commission to determine the interim rates, final rates, and timing of the glide path to the final rate. The FCC should maintain the presumption of symmetrical rates established by state commissions under the TELRIC methodology, with the option of a carrier rebutting that presumption before a state commission so that each carrier may charge its own forward-looking, cost-based rate for termination services. The FCC should also issue a further notice of proposed rulemaking to determine whether to refine its TELRIC rules or adopt a new cost methodology to set Section 251(b)(5) rates.

Fourth, the FCC should adopt reasonable and targeted measures to resolve the problems of phantom traffic and traffic stimulation during the transition to the final rate. The FCC should not adopt any limitations or prohibitions on revenue sharing as part of its traffic stimulation rules.

Finally, the FCC should not address issues that may be tangentially related to intercarrier compensation but have far-reaching and unintended consequences. This category of what the FCC should ***not*** touch includes changes to its interconnection rules (such as the "edge" rules included in Proposals A and C) and classification of IP-PSTN traffic as an information service (which could have unintended consequences for UNE and interconnection rights and obligations).

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I. INTRODUCTION AND BACKGROUND

PAETEC Communications, Inc.; US LEC; and McLeodUSA Telecommunications Services, Inc. (jointly referred to herein as "PAETEC"); Citynet, LLC; Granite Telecommunications, Inc.; RCN Telecom Services, Inc.; and U.S. TelePacific Corp. (collectively, the "Joint

Commenters"), through undersigned counsel, submit their Reply Comments on the *Order and Further Notice of Proposed Rulemaking.*[1]

II. REFORM OF INTERCARRIER COMPENSATION

A. Asymmetric, Cost-Based Rates That Vary By Carrier Comply With the Act and Are Good Policy

1. Uniform Terminating Rates Are Not Required by Law

Although AT&T claims that symmetrical rates are legally required "with narrow exceptions,"[2] it is incorrect.[3] The *Local Competition Order* established "presumptive symmetrical rates," but this presumption is embodied in the Commission's rules, not the Act, and is not absolute.[4] The Commission specified that:

> If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate.[5]

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[1] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68 & 04-36, FCC 08-262 (rel. Nov. 5, 2008) ("*Order and FNPRM*"). The *FNPRM* has three Appendices, each containing separate proposals, referred to herein as Proposal A, Proposal B, and Proposal C.

[2] AT&T at 17, citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013, ¶ 1085 (1996) ("*Local Competition Order*").

[3] Several other commenters urge the Commission to mandate a uniform statewide terminating rate but do not claim it is required by law. *See* CTIA at 26-28; Public Service Commission of Missouri at 3-4; Public Utilities Commission of Ohio at 51; T-Mobile USA at 6; Verizon and Verizon Wireless at 43.

[4] *Local Competition Order*, ¶ 1089. *See* 47 C.F.R. § 51.711(b) (Setting forth circumstances under which state commission may establish asymmetrical rates).

[5] *Id.*

The NPRM recognizes that the proposed symmetry requirement *departs* from current law, noting both that its recommendation stands "[i]n contrast to the approach taken in the *Local Competition Order*,"[6] and that the *Local Competition Order* created "a presumption of symmetry."[7]

AT&T claims its position is consistent with Section 252(d)(2)(A)(i), which provides for "mutual and reciprocal recovery by each carrier of costs associated with … transport and termination."[8] AT&T italicizes the term "of costs" and argues that if Congress had intended to provide for carrier-specific rates, it would have used the word "its" to modify "costs." AT&T also suggests that the omission of "its" *prevents* the Commission from establishing carrier-specific costs. These arguments are not persuasive. Joint Commenters agree with the Public Service Commission of Wisconsin that the term "each carrier" requires that "rates must be determined separately for each carrier."[9] Joint Commenters also agree with the parties who note that the statute fails to require a single statewide rate.[10] To the contrary, the House Report accompanying the virtually identical text of the House bill provided that reciprocal compensation terms "may include a range of compensation schemes"[11] in direct contradiction to AT&T's argument that the

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[6] Proposal A, ¶ 276.

[7] *Id.*, ¶ 278.

[8] AT&T at 17.

[9] *See* Public Service Commission of Wisconsin at 7 (Citing 252(d)(2)(A)(i)) and stating that "The Act requires that the terms and conditions for reciprocal compensation must provide for 'the mutual and reciprocal recovery by *each carrier* of costs associated with transport and termination" (emphasis in original).

[10] *See* Public Service Commission of Wisconsin at 7 ("nothing allows the Commission to require a determination of a <u>single, statewide rate</u> for reciprocal compensation"); NTCA at 42 (Statutory framework in the Act does not provide for a statewide rate). AT&T also contends that Section 252(d)(2)(B)(i) indicates that Congress "wished to avoid carrier-specific calculations of 'additional costs'" by stating that the Commission and state commissions are not authorized "to require carriers to maintain records with respect to the additional cost of such calls," but this does not affect the conclusion either that the statute nowhere mandates establishment of a single statewide rate. *See* AT&T at 17.

[11] House of Representatives, Communications Act of 1995, Rept. 104-204 Part 1 (to accompany H.R. 1555) (July 24, 1995).

Act mandates a statewide rate. At a minimum, as current rules provide, each carrier must have the option of proving that its costs justify an asymmetrical rate. In short, AT&T's claim that symmetrical rates are required under current law finds no support in the Act, *Local Competition Order*, the Commission's rules, or the NPRM.

2. Terminating Rates Should Vary by Company as a Policy Matter

Sound policy reasons support setting terminating rates that vary by company. Mandating indiscriminate uniform statewide rates creates the very real danger of ignoring CLEC network architecture and placing undue emphasis on large RBOC economies of scale that virtually all other carriers likely will never be able to realize. That will effectively mandate that many LECs must forever subsidize terminating services provided to other carriers by charging rates below their reasonable costs.[12]

A second problem with mandating indiscriminate uniform statewide rates using the forward-looking costs of all carriers is that the resulting statewide average rate is likely to exceed the RBOC's forward-looking costs. For example, QSI Consulting, Inc. ("QSI"), in a Reply Declaration submitted today on behalf of PAETEC, shows that "*if a statewide uniform transport and termination rate is adopted, BOCs would over-recover, and other companies would under-recover their cost.*"[13] Requiring CLECs, mid-sized LECs and rural LECs to price termination services at below-cost rates while simultaneously allowing AT&T, Verizon and Qwest to charge prices above *their* forward looking costs advances no legitimate policy objective and is mani-

[12] *See* Joint Commenters' Initial Comments at 12.

[13] Reply Declaration of August H. Ankum and Oleysa Denney, QSI Consulting, Inc., on behalf of PAETEC Communications, Inc. ("QSI Reply Declaration") at ¶ 46 (emphasis in original); *see also id*. at ¶¶ 9, 40-46.

festly anticompetitive.[14] Indeed, since the largest beneficiaries of the below-cost termination rates will be the long distance arms of these same RBOCs, such a result would be patently unfair to all other LECs. The Commission should instead account for legitimate cost and market distinctions by setting terminating rates on a carrier-specific basis.[15] At a minimum, if it nevertheless prefers a statewide rate, then the Commission should direct states to exclude RBOC costs when setting the statewide forward-looking cost-based rate. Further, a statewide rate should reflect costs of a class of like-situated carriers. Using wireless network costs to establish a statewide termination rate for mid-sized LECs and CLECs would ignore the fact that different carriers have different costs and overly complicate each state's ratemaking process.[16] Finally, an RBOC should not be allowed to charge the statewide termination rate until a state commission finds that the RBOC's forward looking costs are at least equal to the statewide rate (based on the same forward looking cost method used to develop the statewide rate).

The European experience does not support the argument that all rates must be symmetric and statewide either. AT&T's comments that European regulators originally adopted asymmetric termination rates because they "wished to create non-neutral subsidies for one group of carri-

[14] *See* Pac-West Telecomm, Inc. at 5-6 (There is no conceptual basis for requiring a lower cost LEC to subsidize the activities of a higher cost LEC in the same state…Mandatory symmetry…will undoubtedly have the effect of severely handicapping CLECs…in their efforts to compete with larger ILECs whose scope of operations allows their network investments to be recovered from other sources, including UNEs that would be priced at incremental TELRIC-defined costs sufficient to permit such recovery); Embarq at 13 (It is unreasonable and inappropriate to assume that mid-size and small carriers can realize the benefits of the economies of scale and scope that large integrated national carriers have achieved. There is no harm in individual carriers or classes of carriers having different transport and termination rates).

[15] *See* Texas Office for Public Utility Counsel at 4 (Single, statewide rate for all terminating traffic is inappropriate since these costs necessarily vary on a carrier-by carrier basis); NTCA at 25 (Uniform or symmetrical rates make no sense...when networks have different cost structures); NECA at 6 (Differentiated rates between carriers for intercarrier compensation are efficient because these rates require the allocation of resources according to the costs associated with doing business in different geographic regions).

[16] QSI Reply Declaration at ¶ 78.

ers"[17] are misleading. First, the European termination rates are (and will remain) very diverse, given that they are mostly regulated on the national level. European termination rates still differ significantly and take into consideration various factors, such as the competitiveness of the national telecommunications industry, national network structure, and market shares. In France, for instance, the fixed termination rates are different for France Telecom and for the competitors (all alternative fixed line competitors charge the same termination rate).[18] Second, the European Commission has never mandated "single, statewide rates." Rather, "The [EU] Commission's draft Recommendation first and foremost aims at greater consistency and more effective regulation of termination rates. The objective is not to regulate down to a particular level, nor to adopt a 'one-size-fits-all' approach."[19] To the contrary, a recent European Regulators Group ("ERG") Report on fixed and mobile termination rates recognizes that certain exceptions to the general

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[17] AT&T at 15-16.

[18] Termination Rates for SMP Market Players: Action Plan to Achieve Conformity with ERG Common Position, at 4 (ERG (08) 45 Symmetry MTR/FTR Action Plan final 081113) ("Report ERG (08) 45"), http://erg.eu.int/doc/publications/erg_08_45_action_plan_to_achieve_conformity_with_the_common_position_on_mtrftr_symmetry.pdf. According to the French Regulator ARCEP's Decision 08-0896, Art. 20, Annexe E (07/29/08), available at http://www.arcep.fr/uploads/tx_gsavis/08-0896.pdf.

France Telecom's average FIXED "medium" (average) termination charges must come down as follows:

as of 01/10/08 = €0.0045 per minute

as of 01/10/09 = €0.00425 per minute

as of 01/10/10 = € 0.004 per minute.

For the ALTERNATIVE carriers' FIXED "medium" (average) termination charges ARCEP imposes the following caps:

as of 01/10/08 = €0.009 per minute

as of 01/10/09 = €0.007per minute

as of 01/10/10 = € 0.005 per minute.

[19] Termination Rates: Questions and Answers (Brussels, 26 June 2008), available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/438&format=HTML&aged=0&language=EN&guiLanguage=en.

principle of symmetry are justified and that two member states, Ireland and Finland, will never achieve symmetric rates.[20]

The Commission should also decline to adopt mandatory symmetric rates because there is nothing "symmetric" about the exchange of traffic between a LEC and an IXC. The concept of symmetric rates inherently involves the assumption that parties will exchange traffic.[21] However, this principle does not apply in all cases, especially between a terminating LEC and an IXC. These parties do not mutually exchange terminating traffic.[22] Indeed, a LEC never "terminates" traffic to an IXC, so it is illogical to ascribe a mutual symmetric relationship between a LEC and an IXC. The Commission's proposed imposition on CLECs of below-cost termination services to IXCs makes no sense as a policy matter. Terminating rates should accurately reflect each carrier's forward looking costs.

Nor will symmetric rates rid the world of arbitrage. Proposal A posits that "asymmetric rates could undermine the comprehensive reform we adopt by permitting different termination rates for traffic in the same geographic area, which could open the door for continued regulatory arbitrage..."[23] This view is echoed by several commenters, without sufficient explanation or justification, who urge the Commission to adopt a unified rate in order to deter alleged arbitrage.[24] But the so-called arbitrage that the Commission has been trying to address for over seven

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[20] Report ERG (08) 45, at 1.

[21] *See Local Competition Order*, ¶ 1069 (Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier). *See also* AT&T at 15 (arguing against asymmetric rates when carriers "exchange traffic").

[22] *See* QSI Reply Declaration at ¶¶ 80-86.

[23] Proposal A, ¶ 279; Proposal C, ¶ 274.

[24] *See* T-Mobile at 6 (a single national termination rate would eliminate arbitrage and other uneconomic behavior entirely and would foster administrative efficiency), CTIA at 26 (preservation of carrier-

years concerns different rates charged by *a single* carrier for different types of traffic delivered to that carrier's end users. If the terminating carrier charges a uniform cost-based rate for all traffic delivered to it by all carriers, it is not clear how this could result in arbitrage. Originating or transit carriers could not avoid this rate by funneling traffic through another provider, because the terminating carrier must ultimately receive the traffic and charge the same rate if the call is going to reach its end user.[25] In fact, rates set on an individual carrier basis would eliminate the potential for arbitrage by reflecting the actual network characteristics of particular carriers.[26]

In contrast, incentives to perpetuate arbitrage would continue if Proposal A were adopted, albeit in a different form.[27] For example, LECs could seek out customers that primarily originate traffic or end users may seek carrier status to avoid end-user usage charges if termination services must be offered by other LECs below cost.[28] In sum, symmetric rates that are not cost-based will perpetuate arbitrage opportunities.

Finally, mandating a uniform statewide terminating rate would violate the Act and one of the Commission's long stated goals of intercarrier compensation reform – to eliminate indirect

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specific termination rates would maintain opportunities for inefficient arbitrage and would therefore disserve consumers).

[25] *See Local Competition Order*, at ¶ 1058 (originating carriers have no alternative but to use the terminating carrier's network to reach the terminating carrier's subscribers).

[26] *See* NTCA at 26 (Sound pricing methods reflecting the actual costs of individual networks would address Commission concerns about rate arbitrage and send rational pricing signals to the communications industry).

[27] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶ 35 ("*2001 NPRM*") ("it appears reasonable to ask whether a particular pricing proposal is likely to create new problems.").

[28] NECA at 27-28 (Noting that proposal to adopt "additional costs" standard reducing all intercarrier charges to uniform levels below TELRIC rates would encourage new forms of economic arbitrage, including, for example, large end users' attempts to seek "carrier' status to take advantage of below-cost interconnection pricing, and stating that "It is hard to understand why the Commission would replace an existing ICC framework that encourages one kind of rate arbitrage with a system that merely creates new forms of rate arbitrage.").

subsidies in access rates.[29] A uniform statewide terminating rate that does not reflect a LEC's forward-looking costs will create a new indirect subsidy benefiting IXCs that terminate traffic. Only by mandating forward-looking cost-based terminating rates for LECs will the FCC satisfy this equally important goal of the Act and intercarrier compensation reform.

B. Any Transition Period for Rate Reductions Must Balance the Desire for Change with the Need to Avoid Disruption.

Several commenters urge the Commission to mandate adoption of a unified rate for all terminating traffic in each state within just a few years. The Commission should reject these arguments because their myopic focus on racing to the end point ignores the huge disruption an accelerated transition would create for end user rates, the industry, and regulators, especially during these difficult economic times.

The Joint Commenters agree that it is important to "get the rules right" for the future,[30] but "getting it right for the future" means more than just jettisoning the existing system as quickly as possible. Many of these arguments proceed from the flawed and speculative premise that rapid changes in technology -- specifically, a migration to IP-based network services -- will outpace the transition period proposed in the FNPRM and lead to collapse of the existing system during that interval.[31] Such comments also assert that "increasing regulatory arbitrage" and "ongoing pressures" on the intercarrier compensation system warrant expedited change,[32] or state simply that "there is no reason for states to wait four years to get started."[33] Those urging a more

[29] *See*, *e.g.*, *2001 NPRM*, at ¶ 32 ("Congress in the 1996 Act directed this Commission and the states to reform universal service, and in particular, to eliminate implicit subsidies contained in access charges and instead make all universal service support *explicit*.").

[30] Verizon and Verizon Wireless at 1.

[31] *See, e.g.,* CTIA at 33; Sprint Nextel at 5; T-Mobile USA at 5; AT&T at 21-22.

[32] CenturyTel at 12; *see also* CTIA at 33; Verizon and Verizon Wireless at 58.

[33] NCTA at 23.

accelerated transition provide no basis[34] to conclude that it is critical to *complete* reform within just a few years or that interim reform milestones during a longer transition period would be insufficient to "get it right for the future."

The Commission must balance the need and desire for reform against the risk of massive financial disruption within the industry and for end users in an already difficult economic climate. Minimizing disruption is critical given the recent confirmation that the United States economy has been in recession since December 2007 -- which already makes this the longest recession since the 1970s -- and predictions that the downturn will continue well into 2009. Although some commentators believe that this industry has been less exposed to the economic downturn than others,[35] it is clear that job losses and economic woes are hitting the industry with increased force and frequency, and that more painful cuts are likely to come.[36] In light of the near term (and the past year's) macroeconomic climate, the Commission should avoid measures that would lead to immediate and substantial shifts in intercarrier compensation-related costs and revenues. Rather, the Commission should provide reasonable forewarning of the specific

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[34] Although the impact of these technology migrations has been anticipated and evaluated since the Commission issued the Report to Congress in 1998, which first foreshadowed the move to IP technology, the intercarrier compensation system has not collapsed, and no one has submitted empirical evidence of a risk of imminent collapse. *See, e.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11541-11545 (1998), at ¶¶ 83-93 (discussing implications of IP telephony); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9657-58 (2001), at ¶ 133 (noting that action was warranted because IP telephony "threatens to erode access revenues"); *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4883 (2004), at ¶ 30; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4750 (2005), at ¶ 148 (noting that the development of IP telephony makes "it increasingly difficult to enforce the existing regulatory regimes").

[35] *See* "Steep Job Cuts Lead to Bleak Economic Picture," *Washington Post*, Dec. 5, 2008, at D1.

[36] *See* "AT&T Layoffs: The Tip of a Telecom Downturn," *BusinessWeek*, Dec. 5, 2008, available at: http://www.businessweek.com/technology/content/dec2008/tc2008124_185061.htm.

changes and a meaningful opportunity for affected industry participants and their end users to adjust to and accommodate those changes.

The two-year standstill and five-year transition period from intrastate to interstate access rates proposed by the Joint Commenters, and echoed by other parties,[37] strikes a reasonable balance between the desire for certainty of reform and the very real impact such reform will have on end users, the industry, and state regulators. Admittedly, some state regulators that have equalized, or reduced the delta between, intrastate and interstate access charges may be able to reduce rates in less than five years after the two-year standstill period ends.[38] But the achievements of a few state commissions should not define a national rule. Rather, those state commissions who need time to complete this process should be given a reasonable opportunity to do so. For example, Qwest's intrastate terminating access rates in Colorado and South Dakota are 2.3 and 5.4 cents higher, respectively, than its interstate rates.[39] Moreover, public filings by Embarq and Windstream show that the average delta between their intrastate and interstate access rates are 2 and 3.7 cents, respectively.[40] This divergence between states and carriers reinforces the

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[37] *See, e.g.*, Broadband Service Providers at 9-10 (advocating a 2-year standstill followed by a 5-year transition for intrastate rate reductions); Broadview, et al. at 35-39 (advocating a 5-year transition period for intrastate access rate reductions starting in 2010); ITTA at 8-9 (advocating a 5-year transition for unification of existing interstate and intrastate access rates); CenturyTel at 12 (supporting ITTA's proposal).

[38] *See, e.g., Ex Parte* Letter from John Kuykendall, John Staurulakis, Inc. to Marlene H. Dortch, dated Dec. 4, 2008, at Attachment p. 1 (stating that South Carolina has taken steps to reduce intrastate terminating access charges to interstate levels); *The Tariff Filing of BellSouth Telecomms., Inc. to Mirror FCC Interstate Access Rates*, Case No. 98-065, Order (Ky. P.S.C. 1999) (approving BellSouth Kentucky tariffs for intrastate access charges that mirror interstate rates); *Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing, 2007 WL 3023991 (Ohio P.U.C.) at *10 (noting that the Ohio commission "requires ILECs to mirror their interstate switched access rate on the intrastate side").

[39] QSI Reply Declaration at ¶¶ 21-22.

[40] *See* Embarq Corporation, Form 10-Q, at 15 (eff. Oct. 30, 2008), available at: http://idea.sec.gov/Archives/edgar/data/1350031/000119312508220240/d10q.htm. *See also* Windstream Corporation, Form 10-Q, at 41 (eff. Nov. 7, 2008), available at: http://idea.sec.gov/Archives/edgar/data/1282266/000119312508229651/d10q.htm.

notion that, rather than adopting a sweeping national rule regarding transition, the Commission should establish broad parameters setting forth transition plan elements within which reform could be achieved on a state-by-state basis based upon local conditions. A two-year standstill is necessary for state regulators to evaluate such conditions and determine the interim rates during the five-year glide path. It is also necessary to allow carriers to adjust their business plans and operations by identifying and implementing alternative means of recovering lost revenue and covering costs (since CLECs presumably will be asked to go without a regulator-sponsored revenue replacement mechanism)[41] and renegotiating agreements, if possible, with existing customers.[42]

To the extent that "regulatory arbitrage" of the existing system is a concern, any operations premised purely upon such so-called "arbitrage" would see the "writing on the wall" from impending reform (including the interim stages of reform) and be forced to retool (or to abandon altogether) their business plans accordingly. This disincentive would affect not only those providers that engage directly in such arbitrage practices, but would apply with equal force to those that offer wholesale services to such arbitrageurs, as the wholesale providers would necessarily see the end of such customers as viable business partners. Moreover, as it has signaled it is prepared to do, the Commission can adopt phantom traffic and traffic stimulation rules that will reduce opportunities for arbitrage during the transition.

[41] *See, e.g.,* Joint Commenters' Initial Comments at Attachment A (Declaration of William A. Haas), ¶ 7, and Attachment B (Declaration of Joseph O. Kahl), ¶ 6 (discussing the revenue losses that would follow from the reforms as proposed); Broadview, et al. at 37-39 (noting that "the loss of intrastate access charge revenues is likely to represent the largest portion of revenue loss to be experienced under the entire reform plan").

[42] *See id.* at Attachment A (Declaration of William A. Haas), ¶ 5, and Attachment B (Declaration of Joseph O. Kahl), ¶ 5 (discussing the average term length of CLEC customer contracts).

Arguments supporting an expedited transition plan are further flawed in that they advocate mandatory caps or rate reductions as a part of accelerated reform without providing a sound statutory basis for the Commission -- as opposed to the state commissions -- to set the interim rates. For example, Verizon proposes that the Commission engage in rate-making by setting an "upper bound" on interim rates and mandating "equal step[]" reductions as the "glide path" during a shortened (3 to 5 year) transition.[43] Likewise, Sprint Nextel would leave little to no state commission discretion in recommending that the Commission mandate specified rate reductions at specified dates during a briefer transition period.[44] Still others propose that any transition period should apply in the same manner to both originating *and* terminating interstate *and* intrastate access charges.[45]

As the Joint Commenters explained in initial comments, the Commission has no authority to set intrastate access or Section 251(b)(5) rates, even on a temporary or transitional basis.[46] Moreover, to survive an inevitable appeal, transitional rates must not be arbitrary and capricious even where the Commission has authority to set them.[47] Proposals such as those made by Verizon ignore these jurisdictional and statutory limitations,[48] and would have the Commission

[43] Verizon and Verizon Wireless at 60; *see also* CTIA at 33-34; MetroPCS at 23 (supporting Verizon's proposed shortening of the transition period and mandatory caps on rates).

[44] Sprint Nextel at 3-4.

[45] *See, e.g.*, iBasis at 4; Global Crossing at 11; Texas Statewide Telephone Cooperative, Inc. at 19.

[46] Joint Commenters' Initial Comments at 2-7.

[47] *Id.* at 8-9.

[48] Verizon, for example, claims that the Eighth Circuit invalidated the Commission's proxy pricing rules merely because of judicial estoppel concerns and an objection to the TELRIC methodology upon which the proxies were based. Verizon and Verizon Wireless at 51. Although these were certainly given as *additional* reasons supporting the court's decision, Verizon encourages the Commission to turn a blind eye to the court's stated primary basis for vacating the proxy prices:

> The Supreme Court held that the FCC "has jurisdiction to design a pricing methodology." *AT & T Corp.*, 525 U.S. at 385, 119 S.Ct. 721. However, the FCC does not have jurisdiction to set the actual prices for the state

prescribe rates without even the pretense of determining whether those rates are just and reasonable. Similarly, those proposals suggesting that the Commission reform all originating access charges at the same pace and in the same manner as terminating access charges pay little, if any, heed to the economic implications of doing so and the jurisdictional and other statutory constraints that limit or even preclude such reform.[49] The Commission should reject the overly simplistic theory that "unification" of intercarrier compensation requires reform of originating access charges on the same track as terminating access charges.[50] Any reform of originating access charges requires a separate and thorough consideration of the applicable economic and legal factors.

Thus, assuming it were able to overcome the significant hurdles to a transition plan as described herein and in the Joint Commenters' initial comments, the Commission should reform *only* terminating rates by: (1) adopting a 2-year standstill before any transition begins; (2) adopting a 5-year (rather than a 2-year) transition for moving intrastate access levels to interstate access levels, beginning at the end of the 2-year standstill; (3) transitioning all traffic to "unified" terminating rates at the end of the entire transition period for *each carrier* based upon a TELRIC

> commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2). Following the Supreme Court's opinion, we now agree with the FCC that its role is to resolve "general methodological issues," and it is the state commission's role to exercise its discretion in establishing rates.

[49] *Compare with* Missouri Public Service at 6 (raising concerns about the lack of consideration with respect to the financial implications of reforming or eliminating originating access charges simultaneously with terminating access charge reductions); Hypercube at 5-14 (discussing the jurisdictional boundaries established by Section 2(b) of the Act, the various limitations on rate-setting under Sections 251 and 252, the need for a consistent economic underpinning to any intercarrier compensation reform, and the requirements of Sections 201 and 205 with respect to regulating and setting interstate rates); *see also* tw telecom at 19; NTCA at 22.

[50] Proponents of putting originating access on the same transition path as terminating access charges insist that "there is nothing in the record to justify the disparate treatment of originating access," but then contradict themselves by urging different treatment (*i.e.*, elimination) of originating access charges at the end of the transition period. *See, e.g.*, iBasis at 4.

methodology (and not the Faulhaber approach) based on each carrier's reasonable costs; and (4) letting each state commission determine the appropriate timing and levels of rate reductions (or increases for certain types of traffic that may be priced below-cost today) for each carrier in its jurisdiction after the standstill and during the transition based upon local telecommunications marketplace and regulatory conditions.

C. The Additional Costs Standard Is Flawed and the Commission Should Not Adopt It

1. Given the Transition That Would Apply Under Any Proposal, the FCC Should Take Advantage of That Time to Get the Cost Standard Right

Because all of the proposals before the Commission provide for some transition period, there is no need for it to adopt a new cost methodology based upon a truncated comment cycle. The Commission should instead digest the comments that have been submitted to date and reject (as Joint Commenters propose), refine or revise the new incremental cost ("IC") standard based upon those comments, and produce a more detailed proposal for comment in a FNPRM.

The necessity for a deliberative and reasoned process is underscored by the current financial turmoil. Any precipitous turn to a new methodology that sets rates too low could have disastrous implications for the telecommunications industry.[51] In its Reply Declaration submitted today on behalf of PAETEC, QSI estimates that the annual reduction in usage-based revenues for all local exchange carriers associated with the proposed intercarrier compensation reforms (including both reduction of terminating access charges and elimination of originating access) would be approximately $9.9 billion, representing roughly a *9% reduction in total local (end-user and wholesale) annual revenue*.[52] Moreover, this estimate does not include likely reductions in *special access* revenues that would result as IXCs choose to purchase lower-priced

[51] *See* NTCA at 40-41.

[52] QSI Reply Declaration at ¶¶ 7, 15-17, and Appendix 1.

switched access services in lieu of procuring special access services as they do today when volumes are significant enough on certain routes.[53] Nor can the Commission overlook the impact on both the industry and the economy as a whole of the revenue recovery mechanisms that it would propose to implement (to help all but the CLECs) with these reforms. In the shifting of dollars from access to subsidy, the Commission could create a massive demand for and balloon in the universal service fund at a time when there is already talk of a significant expansion of USF to cover broadband connectivity as well.[54] If all incumbent local exchange carriers are permitted to recover the lost access revenue remaining after SLC increases, the federal Universal Service Fund could increase by $5.1 billion annually, which would have to be funded by a per subscriber USF fee increase of $1.06.[55] Finally, those who would gain significantly from a payor perspective -- AT&T, Verizon, and Qwest as some of the largest IXCs -- also happen to be the least affected from a percentage-of-revenue perspective, demonstrating yet again who is most likely to "win" under these proposals.[56] Under these circumstances and given the complexity of the issues, the Commission should take a measured approach to abandoning the TELRIC cost methodology and refrain from adopting the IC standard in haste (if at all).[57]

[53] *Id*. at ¶¶ 23-24.

[54] *Id*. at ¶¶ 27-28.

[55] *Id*. at ¶¶ 26-29.

[56] *Id*. at ¶ 18 (estimating that the Bell companies lose only 7% of their local revenue as a result of the proposed reforms); *see also id* at ¶ 78 ("AT&T and Verizon, as the largest interexchange carriers, would in effect receive huge discounts for their terminating long distance traffic . . . . To the extent that they also may incur revenue reductions associated with their own access services, those revenue shortfalls would be largely offset by increases in local service rates for monopoly ratepayers and increased universal service subsidies. The ploy is transparently a *win-win* for AT&T and Verizon, and a *net loss* for almost all carriers that do *not* have monopoly ratepayers and/or receive universal service subsidies.").

[57] *See* New York Public Service Commission at 6-7 (noting impracticality of IC standard and stating that "[t]he questions seem endless, and the answers would be largely subjective and surely controversial"); Missouri Public Service Commission at 3 (noting its "reservations about implementing a new costing methodology at this time," due in part to the limited information provided by the Commission about why TELRIC is not acceptable or cannot simply be modified).

2. <u>The Proposed Incremental Cost Methodology is Far Too Untested For Use in Setting Termination Rates and Was Never Intended For That Purpose</u>

The analyses submitted by economists thus far in this proceeding show that replacing TELRIC with the proposed IC standard is a radical and results-oriented departure from existing time-tested, court-approved rate setting practices, and demonstrate that the standard should not be adopted by the Commission.

TELRIC is a thoroughly entrenched methodology that is currently used by state commissions in setting prices for access to 252(c) UNEs, interconnection and collocation incorporated into interconnection agreements approved by state commissions throughout the country.[58] The difficulties inherent in precipitously abandoning TELRIC in favor of the IC standard cannot be overstated, and the Commission should consider the unintended consequences of such action on other aspects of the regulatory and USF framework. These include, but are not limited to, the effect of the new IC standard on the comprehensive framework of existing federal and state regulations that rely on TELRIC-based methodologies.[59]

The Commission must also evaluate the burdensome implementation requirements and threshold theoretical questions associated with IC before considering its adoption. Development of a statewide IC model would require each state commission to account for the disparate networks of incumbents, CLECs, rural carriers, wireless carriers, and cable companies in executing the new requirements, which could very possibly lead to fifty different resolutions of the

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[58] Declaration of August H. Ankum and Oleysa Denney, QSI Consulting, Inc., on behalf of PAETEC Communications, Inc. ("QSI Declaration") at 9-10; Declaration of Lee L. Selwyn, Economics and Technology, Inc., on behalf of Broadview Networks, Cavalier Communications, Nuvox, Inc., Pac-West Telecomm, Inc., tw telecom inc. and XO Communications ("ETI Declaration") at 2-3.

[59] QSI Declaration at 10-11, 22 (describing Illinois Administrative Code Long Run Service Incremental Cost ("LRSIC") pricing requirements that would be displaced by adoption of IC standard, resulting in likely carrier violation of statutory requirements).

many implementation issues that each commission would have to address.[60] This dislocation and disruption can easily be avoided if the Commission leaves the current TELRIC methodology in place.

Numerous other reasons exist to retain the TELRIC regime in lieu of the proposed IC standard. Adopting a different regulatory treatment for traffic termination would give an advantage to other elements and functionalities, contrary to the purpose of TELRIC, which is the result of balanced consideration of the concerns of both incumbents and new entrants.[61] Also, the IC standard ignores the fact that facilities priced at TELRIC (or even special access) rates are used by carriers to handle termination and other call routing services that are usage sensitive; the proposed IC standard does not account for the legitimate and varying costs of these critical inputs into termination services. In addition, substitution of the IC standard for TELRIC would result in a lower cost for transport and termination of traffic (a service for which RBOCs are purchasers) while maintaining TELRIC-based rates for all other services and elements (for which RBOCs are sellers) -- a result plainly inconsistent with the pro-competition goals of the 1996 Act.[62]

Finally, the IC standard should not be adopted because, as Dr. Selwyn notes, Gerald Faulhaber indicated that the purpose of his methodology was not to *set* prices, but rather to find a price *floor* to identify subsidies.[63] The Faulhaber method, which was developed in 1975, was intended to apply only in a regulated environment for purposes of considering the prices that a

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[60] QSI Declaration at 12.

[61] ETI Declaration at 4-5, 7.

[62] ETI Declaration at 3.

[63] ETI Declaration at 8, 23-27.

single firm may charge any subset of customers buying a regulated product.[64] In an environment where a single firm may provide a mix of regulated and competitive services, RBOCs have a strong incentive to assign joint costs to monopoly regulated services (where recovery is guaranteed) and would have the perverse inventive to apply the IC standard to competitive services to lower the price floor.[65] This is precisely what is happening with termination facilities as opposed to UNEs and interconnection facilities, and adoption of the IC standard would merely perpetuate this system to the detriment of competitive entrants.

3. There are Numerous Problems With the Incremental Cost Standard Discussed in the Chairman's Proposal

Even if the Commission were to look past the stability of the TELRIC methodology, the burdens associated with moving to an IC standard, and the fact that the Faulhaber method was never intended for use in the way that Proposals A and C would suggest, the incremental cost standard set forth in Proposals A and C is characterized by numerous problems that preclude its adoption. For example, despite the Commission's reaffirmation of the continued use of a long run incremental cost standard, the IC proposal appears to consist of a short-run methodology that fails to take adequate account of volume and capacity impacts. The Commission's near-zero cost assumptions must be short-run because handling the assumed total volume of terminating traffic would require substantial long-term investments.[66] Furthermore, the example offered by the Commission to justify the use of short-run incremental costs, that of selling empty airline seats, is inapposite. Although offering seats at a "short run" cost may result in a greater number of sold seats, less revenue will be received overall, which makes this analogy unpersuasive.[67]

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[64] ETI Declaration at 24-26.

[65] ETI Declaration at 27.

[66] QSI Declaration at 5-6.

[67] ETI Declaration at 9-10, *citing* NPRM, App. A, ¶ 244, and App. C, ¶ 239.

The IC proposal also confuses "fixed costs" (which would be excluded from the cost calculation) and the economic concepts of "breakage" or "lumpiness" in supply or demand.[68] Although it may be true that an additional increment *could have* little impact on fixed cost, the reverse situation could also be true. An additional increment could have an enormous impact on fixed cost since capacity is also purchased in increments; the next unit could drive a requirement for additional capacity and have a huge impact on cost.[69] Despite the Commission's finding that the incremental cost of adding traffic to fiber is "likely to approach, or equal, zero,"[70] it is by no means certain that this is the case. Instead, capacity additions may be very expensive, involving factors such as permitting, construction, and other issues (*e.g.*, the electronics equipment) not addressed by the Commission.[71]

Similarly, one of the key assumptions underlying the IC proposal is that the entire network should be modeled on a softswitch architecture that is largely non-traffic sensitive.[72] However, softswitch ports may have even greater traffic sensitivity than legacy circuit-switched ports, and the discussion in the FNPRM to the contrary is largely unsubstantiated.[73] In fact, even AT&T -- upon whose arguments the proposals in the FNPRM relied to the exclusion of all other good and sound evidence -- now acknowledges that trunk ports should be considered traffic-sensitive.[74] The 100% softswitch assumption likewise ignores the fact that softswitch deploy-

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[68] ETI Declaration at 6, 11.

[69] QSI Reply Declaration at ¶¶ 34-39; ETI Declaration at 11-12 (explaining that plant and equipment must ordinarily be purchased on incremental units that involve multiple units demand).

[70] App. A, ¶¶ 272-274.

[71] ETI Declaration at 12-13; QSI Reply Declaration at ¶ 36.

[72] QSI Declaration at 7-8, *citing* App. A, ¶ 272.

[73] QSI Declaration at 7-8 and 15-18; ETI Declaration at 14-15; *see also* AT&T at 13 (transit and shared transport ports are traffic sensitive, but interconnecting trunk ports for a single carrier are not).

[74] AT&T at 13.

ment may not represent the most efficient or practical network architecture.[75] Furthermore, because RBOCs generally do not permit CLECs and other carriers to interconnect based on the IP-enabled format inherent in softswitches, the exogenous need for TDM conversion and traffic exchange must be factored into any calculation of costs.[76]

In addition, the IC standard would inappropriately exclude joint costs that are necessary to provide the product in question. This facet of the proposed standard unreasonably disregards the fact that some shared and common expenses, such as those related to product management and collections, are justifiably attributed to intercarrier compensation.[77] It also ignores the reality that business cases for capital investment in multi-product firms generally assume the recovery of such costs across several products, which the IC standard does not recognize.[78]

Furthermore, the IC standard favors large RBOCs because they consist of multiproduct firms producing a broad mix of services that share a large array of common plant and other corporate resources.[79] It follows that in smaller firms with fewer products, the incremental cost will be a proportionately larger part of the firms' costs. If specialized CLECs are forced to charge rates based upon the BOC's incremental cost, they will under-recover their own costs.[80] This is inappropriate, in part, because the 1996 Act neither expects nor requires that a CLEC

[75] QSI Declaration at 20-21 (citing numerous reasons why a hybrid architecture will remain the norm, even in the most advanced telecommunications network, for a long time to come); *id.* at 21, *citing* Texas PUC Project No. 34293, Letter from AT&T at 1 (July 10, 2007) (softswitches may not be the most efficient system for reaching POTS lines).

[76] QSI Declaration at 19, 26-27.

[77] QSI Declaration at 18. Furthermore, unlike the current TELRIC methodology, which incorporates a reasonable allocation of overhead costs, the IC standard fails to account for the fact that overhead costs are not fixed, but vary with a company's direct costs and scale of enterprise. ETI Declaration at 18-23.

[78] ETI Declaration at 16-18.

[79] ETI Declaration at 28.

[80] QSI Declaration at 18-19, ETI Declaration at 28-30.

pursue the same mix of services as an ILEC, and the "patently unfair and grossly anticompetitive" result of such a policy is further reason for the Commission to reject the IC standard.[81]

Finally, the statewide rates contemplated by the Commission as part of the IC standard fail to recognize entirely legitimate geographic cost differences that counsel against the application of uniform rates. The Commission has recognized in other contexts that rates properly differ by geography, and there is no reason to depart from that approach here.[82] Moreover, costs differ by carrier. As QSI explains, a sample exercise using a "synthesis" costing model confirms the disproportionate impact of a one-size-fits-all price on smaller carriers with higher costs.[83] Indeed, a statewide analysis will allow the RBOCs (*i.e.*, AT&T, Verizon, and Qwest) to over-recover because their costs are lower than the averaged statewide result.[84] States have likewise acknowledged the carrier-specific nature of costs, and have long incorporated this principle in ratemaking proceedings throughout the country.[85] In fact, state commissions are better equipped than the Commission to evaluate what is the least-cost and most efficient network, and Joint Commenters urge the Commission to leave this determination to state commissions when establishing any new cost standard.[86]

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[81] *See* ETI Declaration at 29.

[82] QSI Declaration at 24. *See* NTCA at 42 (Since costs and network configurations vary significantly by carrier, company-specific rates continue to be appropriate). Inconsistent views espoused by carriers such as AT&T, which argues against TELRIC application because it involves "average-cost pricing," but then supports a statewide rate, should be disregarded. AT&T at 10, 14. AT&T also contends without shame that statewide-averaged pricing is consistent with a free-market outcome. AT&T at 15. Of course, such an argument breezes past the fact that free-market outcomes typically do not include government-sponsored revenue recovery such as SLCs and USF distribution.

[83] QSI Reply Declaration at ¶¶ 9 and 40-46.

[84] *Id*. at ¶ 46.

[85] QSI Declaration at 24-25.

[86] Michigan Public Service Commission at 10-13.

4. The Proposals Fail to Provide an Adequate *Statutory* Justification for Adopting the New Incremental Cost Standard and Rejecting TELRIC.

For over a decade, the Commission has interpreted Section 252(d)(2) as requiring the use of a TELRIC methodology for the pricing of transport and termination of traffic under Section 251(b)(5).[87] Hundreds of arbitrations and generic pricing proceedings conducted by state commissions in the past dozen years have relied upon and implemented this directive in setting rates for transport and termination. Seeking now to depart from the TELRIC methodology for the transparent purpose of lowering rates solely for transport and termination (as compared to the rates for any other service or element), Proposals A and C in the *Order and FNPRM* revisit this well-settled statutory analysis and suggest that Section 252(d)(2) now supports a different pricing methodology. But "market developments" are insufficient standing alone to depart from the existing legal interpretation of Section 252(d)(2),[88] and any new methodology adopted by the Commission must stand on a solid statutory foundation. There is no such foundation for the "additional cost" methodology.

Few commenters attempt to justify the proposed new incremental cost methodology by reference to the Act, and even these commenters provide little *affirmative* statutory justification for the new proposal. Rather, their primary claim with respect to the Act appears *relative* -- that differences between the wording of Sections 252(d)(1) and 252(d)(2) justify the adoption of differing pricing methodologies.[89] Of course, even if the Commission *could* adopt different

[87] *Local Competition Order*, 11 FCC Rcd at 15844-96, ¶¶ 672-732 and at 16023-25, ¶¶ 1054-1057.

[88] *Order and FNPRM*, at Attach. A, ¶ 239 and Attach. C, ¶ 234.

[89] *See, e.g.*, CTIA at 24.

methodologies under these sections does not mean that the Commission *should* adopt *this* proposed incremental cost methodology or that it comports with Section 252(d)(2).[90]

In an attempt to provide some legal justification for the new reading of this statutory pricing standard, Proposals A and C note that there is another place in the Act where the term "additional costs" appears -- Section 224, the statutory provision for setting pole attachment rates. Observing that the term "additional costs" in Section 224 has been interpreted to mean incremental cost, Proposals A and C conclude that identical words used in different parts of the same act should be presumed to have the same meaning.[91] In its comments, AT&T makes much of this statement, in part because it permits AT&T to assert that the interpretation of "additional costs" in Proposals A and C is supported by legislative history.[92]

But comparison of Section 252(d)(2)(A)(iii) with Section 224(d)(1), the applicable pole attachment statute, shows that the term "additional costs" is used for quite different purposes in the two situations. First, the term "additional costs" in Section 224 is used in the context of establishing the *lowest* just and reasonable rate boundary of a range that is permitted by statute.[93] The term "additional costs" is not used in defining the *upper* end of the range. Naturally, in a statute that provides a range, the focus has been on the upper end, which most pole owners seek to charge for attachments, so the true contours of what "additional costs" means in the pole

[90] Moreover, even the assumption that the Commission can adopt different standards under Sections 252(d)(1) and 252(d)(2) is an unsupported leap of logic. *See* Sprint Nextel at 13-14 (claiming that because Section 252(d)(1) requires "nondiscriminatory" pricing, "where the same inputs are used under both sections, the same costing standard should be used").

[91] *Order and FNPRM* at Attach. A, ¶ 264 and Attach. C, ¶ 259.

[92] AT&T at 9.

[93] 47 USC § 224(d)(1); *cf.*, Memorandum Opinion and Second Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d 59, ¶ 28, (1979) (in a Commission rulemaking, characterizing the "additional costs" element of pole attachment rates as being applicable to the "lower" just and reasonable rate boundary).

attachment context has not been fully explored. By comparison, there is no range of rates in Section 252(d)(2)(A)(iii).

There is also no suggestion in the Commission's rules applying Section 224 that common costs cannot be included in the calculation of "additional costs." Indeed, the Commission has interpreted "additional" costs in Section 224 to include the cost of vehicles and other tools not devoted exclusively to installation of cable television installations to be included in pole owner's recurring charges for CATV attachments.[94] Thus it is inaccurate to state that the Commission's construction of "additional" in Section 224 supports excluding all shared or common costs from terminating intercarrier compensation rates.

Finally, the legislative history AT&T focuses on in its Comments is not very helpful. First, the history cited relates to the Communications Act Amendments of 1978, enacted eighteen years prior to the 1996 Act that brought Section 252 into being.[95] Second, the Commission itself found that the legislative history contained "inconsistencies" in defining what should be included in "additional costs."[96] As such, this inconsistent legislative history from 1978 is not a credible indication of what Congress intended when adopting the additional cost standard in 1996.

In the *Local Competition Order*, the Commission found that TELRIC provided a sound basis for pricing the "reasonable approximation of additional costs" because, among other things: (1) the costs of transporting a carrier's own calls across a network were "largely indistinguishable" from the costs of transporting another carrier's calls across that same network; (2) there is some "substitutability" between transport of traffic using unbundled network elements priced

[94] 72 F.C.C. 2d 59 at ¶ 29.

[95] *Id.* at ¶ 1.

[96] *Id.* at ¶ 9.

under Section 252(d)(1) and transport of traffic under Section 252(d)(2).[97] Before jettisoning over a decade of consistent statutory interpretation (and the hard work of every state commission during that period), one would expect the Commission to address these specific points and explain why they are no longer valid. But the Proposals fail to consider, revisit, and reject these considerations. Instead, Proposals A and C sweep right past the Commission's prior effort at statutory interpretation,[98] and rely instead largely upon the kind of relative statutory analysis discussed earlier in this section -- the "there's nothing preventing us from adopting a different standard" theory -- to launch into a new perspective on how to price out "additional costs."[99] Even if the Commission has authority to interpret ambiguous statutory terms such as "additional costs,"[100] it must confront and explain why its prior interpretation of the statute is no longer valid.[101]

D. The Commission Should Take Proactive Measures to Prevent "Self-Help" During the Transition

The Commission should reiterate that carriers may not engage in "self-help" and refuse to pay tariffed access charges during any transition period to lower intercarrier compensation rates. The FCC has long prohibited carriers from engaging in "self-help," finding that "a customer, a competitor, is not entitled to the self-help measure of withholding payment for tariffed services

[97] *Local Competition Order*, ¶ 1054.

[98] This is not to say that the Proposals do not express opinions and concerns with respect to certain aspects, assumptions, and inputs of the TELRIC methodology in the *Order and FNPRM*. The Proposals devote a good deal of discussion to concerns about the inclusion of common costs, etc. in the TELRIC pricing standard. But the Proposals do not rebut the specific logic that led the Commission to assume as a matter of statutory interpretation for the past twelve years that the pricing standard for Section 252(d)(2) should be the same as that for Section 252(d)(1).

[99] *See Order and FNPRM* at Attach. A, ¶ 265 and Attach. C, ¶ 260.

[100] *Id*. at Attach. A, ¶ 263 and Attach. C, ¶ 258.

[101] Indeed, if the Commission cannot do so, then arguably *both* the TELRIC methodology *and* the new incremental cost standard should be considered equally valid under Section 252(d)(2) (but for the other concerns raised herein with respect to the new standard), and a state commission could be justified in using *either methodology* to fulfill its transport and termination pricing obligations under the statute.

duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."[102] This pay first and dispute later principle[103] was affirmed in *MGC Communications v. AT&T Corp*.[104] There, over the period from August 1998 to July 1999, AT&T advised MGC that it would not pay for MGC's interstate access services, but kept accepting and using those services. AT&T's failure to pay for those services was found to be impermissible self-help and a violation of section 201(b) of the Communications Act.[105]

Notwithstanding these FCC findings, IXCs continue to withhold access payments as leverage to force CLECs into accepting lower rates or exact other concessions. For example, AT&T began withholding all access payments to McLeodUSA shortly after the FCC adopted a transition period to bring CLEC interstate access rates down to ILEC levels. As explained by Mr. Haas, by withholding all access charge payments, AT&T forced McLeodUSA to enter into an access service agreement and settlement whereby McLeodUSA "agreed" to bill AT&T *both* interstate and intrastate access rates at ILEC rate levels, which was well below tariffed rate levels, prior to the transition benchmark period established by the FCC. AT&T would not pay McLeodUSA for access services until McLeodUSA had signed the agreement and settlement. AT&T's withholding of all access payments until a settlement was reached in December 2001

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[102] *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 at n.53 (Common Car. Bur. 1997) (citing *MCI Telecommunications Corp.*, 62 F.C.C.2d 703, 705-706 (1976)).

[103] The pay first and dispute later policy is based on the filed rate doctrine. Also known as the filed tariff doctrine, it is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, was later applied to telecommunications common carriers and was eventually codified in Section 203 of the Act. Once filed, tariffs establish the rates long distance carriers must pay for tariffed services, and "have the force of law." *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980).

[104] *MCG Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11,647 (Comm. Car. Bur. 1999), affd., 15 FCC Rcd 308 (1999).

[105] *See id.*, 14 FCC Rcd at 11659, ¶ 27.

placed a significant strain on the cash flow of McLeodUSA in 2001.[106] Other IXCs engaged in the same or similar self help strategies with McLeodUSA and other CLECs to force CLECs to forego the reasonable glide path that the FCC had established to reform CLEC interstate access rates. More recently, Qwest, AT&T, and Verizon complained that connecting carriers were billing them millions of dollars in inflated access fees monthly. The FCC made clear that Qwest, AT&T and Verizon could not block traffic unilaterally, either to put pressure on the other carriers to lower their charges or to avoid incurring greater liabilities to those carriers. Instead, the FCC required these common carriers to complete traffic while pursuing their complaints against the interconnecting carriers in appropriate forums.[107]

Given the IXCs' repeated failures to heed FCC findings that self-help is an unreasonable practice and violation of Section 201(b), the Commission must make clear that carriers may not refuse to pay competitors for lawful tariffed charges, engage in traffic discrimination, or under-take any other practices designed to force competitors to transition to lower rates sooner than required by the FCC or state commission.[108]

In order to add teeth to this prohibition on self-help, the Commission should adopt a base forfeiture for self-help violations by customer-competitors.[109] The Joint Commenters respectfully urge the Commission to consider revising the base forfeiture schedule to make clear it will levy penalties against carriers that engage in this discriminatory and anti-competitive practice. Self-

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[106] *See* Reply Declaration of William A. Haas, ¶ 6 (attached hereto as Exhibit A).

[107] *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 1 (Wireline Comp. Bur. 2007) ("*FCC Call Blocking Order*") (citing Sections 151 and 254 of the Communications Act).

[108] Although carriers may have legitimate disputes concerning jurisdictional classification of traffic, those disputes should not give a customer a free pass to refuse to pay all intercarrier compensation charges.

[109] *See* 47 C.F.R. § 1.80.

help, like those activities outlined above, is more than a simple customer dispute -- it threatens smaller carriers with the loss of their business, results in customer disruptions such as the loss or reduction of service, and threatens the ubiquitous connectivity of the telecommunications network generally. Section 503 of the Act provides that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.[110] The Commission has wide discretion in determining forfeitures for violations of the Act, and the Joint Commenters urge the Commission to issue any such forfeiture notices in an amount consistent with other recent penalties levied for a variety of violations of the Act. For example, for each month in which a carrier has failed to pay required universal service contributions, the Commission has established a base forfeiture amount of $10,000 (for underpayment) or $20,000 (for no payment), plus an upward adjustment based on one-half of the company's approximate unpaid contributions to address both the detrimental impact on the Universal Service Fund and the illegitimate competitive advantage the non-payer gains.[111] Similarly, the guidelines "establish a standard forfeiture amount of $40,000 for violations of our rules and orders regarding unauthorized changes of preferred interexchange carriers,"[112] another anti-competitive practice. The public interest requires common carriers to complete their customers' calls and pay lawful tariffed compensation rates to their common carrier competitors. The Commission should enforce this requirement

[110] 47 U.S.C. § 503.

[111] *See, e.g., Telrite Corporation, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-05-IH-2348, NAL/Acct. No. 200832080084, ¶¶ 14, 24-25 (rel. Apr. 17, 2008) (imposing $924,212 forfeiture for failure to pay USF, TRS, NANPA, and other regulatory fees over the course of approximately two years, which contained an upward adjustment of $417,438, which represented 50 percent of the largest balance due during that period).

[112] *Horizon Telecom, Inc., Apparent Liability for Forfeiture*, File No. EB-07-TC-4006, NAL/Acct. No. 200832170013 (rel. Feb. 29, 2008) (fining Horizon $5,084,000 for slamming and other violations).

with investigations and forfeitures just as it does in other instances of non-payment (USF) and other anti-competitive practices (USF and slamming).

III. LECS MUST RETAIN UNE AND INTERCONNECTION RIGHTS AND OBLIGATIONS IF THE COMMISSION CLASSIFIES IP/PSTN TRAFFIC AS AN INFORMATION SERVICE AS PART OF INTERCARRIER COMPENSATION REFORM

Based on *ex parte* discussions with various offices, the Joint Commenters understand that the goal of classifying IP-based services as "Information Services" is for traffic compensation purposes only, and that this classification is not intended to affect interconnection and unbundled network elements ("UNEs") rights and obligations under Sections 251 and 252. That being said, a wide array of initial comments validate Joint Commenters' fear that continued Commission silence will be interpreted as an end to the market-opening protections of Sections 251 and 252 for the delivery of competitive IP-based services to consumers. A number of state public utility commenters have questioned whether such a classification would result in the loss of CLEC access to UNEs and interconnection rights. To avoid any doubt, the Commission must be explicit that it will not (if it classifies IP services as Information Services).

For example, the California Public Utilities Commission ("CPUC") points out that "the classification of IP-PSTN traffic as an 'information service' raises questions about the interconnection rights of the providers of such services," and that Section 251(a) of the Communications Act only requires that "telecommunications carriers" interconnect with all "other telecommunications carriers," but is silent as to the rights of information services, if any, to compel such interconnection.[113] In its comments, the CPUC referenced the *VTel Petition*,[114] indicating that

[113] California Public Utilities Commission at 8. *See also* Massachusetts Department of Telecommunications and Cable at 9-16, Public Service Commission of Wisconsin at 8-10 (supporting classifying interconnected VoIP as a telecommunications service); National Association of Regulatory Utility Commissioners at 11-16; National Association of State Utility Consumer Advocates at 8-9; New York

silence on this issue will only spawn similar petitions.[115] Because state utility commissions are typically the first arbitrator of interconnection and UNE disputes between CLECs and ILECs, the FCC should adopt a national standard that directs the states to preserve CLEC interconnection and UNE rights notwithstanding any regulatory classification it makes with respect to IP/PSTN traffic.[116] Silence will only result in confusion, and therefore, potentially conflicting state commission determinations that could threaten the robust competition VoIP services have brought to fulfill the vision of the 1996 Act. It would be virtually impossible for a CLEC to operate using IP-based services with a patchwork of state decisions. Indeed, it would only take one or two erroneous state decisions affecting major markets before the use of any IP service offerings is completely undercut throughout the nation.

As Joint Commenters argued, the principles of *Time Warner Order* apply with equal if not greater force after a service is classified as "information" because information service providers are end-user customers of a LEC's retail telecommunications services.[117] Other com-

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Public Service Commission at 17-19; Pennsylvania Public Utility Commission at 32; Public Utilities Commission of Ohio at 8-12.

[114] *Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, Petition for Declaratory Ruling (filed April 11, 2008) ("*VTel Petition*").

[115] California Public Utility Commission at 8.

[116] *Local Competition Order*, ¶ 53 ("FCC establishes uniform, national rules for some issues…"). *Id.*, ¶ 54 ("We conclude that the Commission should define at least certain minimum obligations that Section 251 requires, respectively, of all telecommunications carriers, LECs, or incumbent LECs.").

[117] *See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631, 2633, ¶ 20 & n.53 (1988) ("At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges."). *See also Amendments of Part 69 of the Commission's Rules Relating to the Creation of Sub-elements for Open Network Architecture*, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-89 & n.71 (1989) (noting that "[t]he access charge exemption for enhanced services is implemented by treating ESPs as end users for the purposes of Part 69."); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15982, ¶ 348 (1997) ("We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system.").

menters support the urgent need for clear Commission directives on this point. For example, the VON Coalition states, "the Commission should clarify that nothing in the order disturbs section 251 interconnection and [UNE] rights and obligations regardless of the classification of the traffic, as the Commission did in its [*Time Warner Order*]."[118] Global Crossing,[119] NCTA,[120] Sprint Nextel,[121] Time Warner,[122] and T-Mobile[123] also urge the Commission to affirm interconnection rights for LECs if IP-PSTN services are classified as information services. Broadview et al. argue that if VoIP is classified as an information service, "it is essential that the Commission make clear that its classification… does not undermine the rights of facilities-based [CLECs] to obtain UNEs and interconnection pursuant to Sections 251(c)(2) and (3) when providing IP-based services to end users or other carriers."[124]

Even Verizon and AT&T agree that an information service classification should not disturb a LEC's rights to interconnection.[125] While AT&T argues that a facilities-based LEC should not be subject to *Computer Inquiry* unbundling requirements,[126] it does not address a CLEC's right to use 251(c)(3) UNEs in the provision of telecommunications service to the CLEC's customer or its information service. As Joint Commenters showed, the telecommunications service the LEC provides to the information service/provider is what entitles the LEC to

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[118] VON Coalition *et al.* at 8.

[119] Global Crossing at 3, 8.

[120] National Cable and Telecommunications Association at 8, 13-15.

[121] Sprint Nextel at 9-10.

[122] Time Warner at 1-8.

[123] T-Mobile at 10.

[124] Broadview Networks, Inc. *et al*. at 13-14.

[125] Verizon and Verizon Wireless at 27 (FCC should make clear affiliated and unaffiliated wholesale LECs retain interconnection rights, including under Sections 251(c)(2) and 252(d)); AT&T at 25 (CLECs will still be entitled to Section 251(a) and (b) rights).

[126] AT&T at 25-27; *see also* Verizon and Verizon Wireless at 25-27

use UNEs.[127] Alternatively, as Broadview *et al.* argued, if it classifies IP-PSTN services as information, the Commission should make clear a CLEC's right to classify the CLEC's services as telecommunications services in order to retain the right to UNEs.[128]

Today, CLECs rely on access to cost-based interconnection and UNEs to deliver bundled IP-based services to millions of end user and carrier customers. The Commission must ensure that it does not inadvertently undermine this current form of broadband competition. Indeed, in light of President-elect Obama's transition team's pronouncements that the new administration will focus on deploying broadband and broadband services, it would be absurd for the Commission not to protect the most prevalent form of broadband competition that exists today. Affirmation of LEC rights to interconnection and UNEs that enable them to provide wholesale telecommunications to third party end users such as VoIP providers is necessary to ensure the ubiquity and reliability of the public network. Any regulatory uncertainty will lead right back to the Commission's doorstep in the form of litigation and countless petitions seeking declaratory rulings on various interconnection scenarios. If the Commission intends to provide answers to long-standing regulatory classification questions, it should do so in a meaningful way, and not in a manner that will produce more uncertainty and administrative costs than the problem it purports to resolve.[129]

In the alternative, should the Commission be unable or unwilling to affirm interconnection and UNE rights and obligations at this time, the Joint Commenters respectfully urge the

[127] Joint Commenters' Initial Comments at 15-18.

[128] Broadview Networks, Inc. et al. at 13-15.

[129] Likewise, and as set forth more fully in the Joint Commenter's Initial Comments, the Commission should affirm that RBOCs must allow CLECs to interconnect with RBOC VoIP customers should the FCC classify VoIP as an information service. Failure to do so will lead RBOCs to claim that CLECs have no 251(a) or (b) rights *to reach the RBOC's VoIP customers* in an effort to force CLECs to sign significantly more costly commercial agreements, just as they do now with respect to IP interconnection and commercial UNE-P replacement services.

Commission not to classify VoIP as part of intercarrier compensation reform, and instead make such a determination in a separate proceeding in WC Docket No. 04-36. Such deferral would allow the Commission to consider all of the ramifications of its decision, and to address them as appropriate. If the Commission is unwilling or unable to address the significant interconnection and unbundling issues surrounding a regulatory classification of VoIP at this time, then "this time" may not be the "right time" to make a VoIP regulatory classification decision in the first place.

IV. TRAFFIC STIMULATION RULES SHOULD NOT BE BASED ON REVENUE SHARING

Any rules adopted by the Commission to address traffic stimulation problems should be narrowly tailored to stop such practices where they are prone to abuse. Sprint, for example, has proposed "trigger and certification" safeguards[130] that minimize the impact on innocent LECs not engaged in unreasonable traffic stimulation "by refin[ing] its proposal to limit CLEC certifications to those carriers that base their rates on either the rural benchmark or the rural exemption."[131] A narrowly tailored proposal is more likely to address the real problem of traffic pumping activities moving unchecked from one LEC to another while avoiding unintended consequences of penalizing LEC's for legitimately growing traffic volumes.

In contrast, Qwest and AT&T continue their attempts to stifle legitimate business arrangements of LECs generally by prohibiting "revenue sharing." Whether characterized as a "net payor" test, a "per se unreasonable practice," or a limit on a LEC's ability to rely on the filed rate

[130] *See* Sprint-Nextel Comments at 8.

[131] *Id.* at 8, n.8.

doctrine, as PAETEC has shown,[132] any such general prohibition on revenue sharing activities is anticompetitive, overbroad, under-inclusive, and unnecessary. Further, these proposals unfairly prohibit one type of business inducement used by LECs to attract new customers while they permit other types of inducements to continue unabated. Unless the Commission imposes a similar "net payor" test on all forms of business inducements used by LECs, it would be unfairly discriminatory to limit application of the test to one marketing tool used by LECs.

Qwest requests that the Commission find "that it would be *prima facie* evidence of an unreasonable practice under Section 201(b) of the Act for a LEC to share its access revenues with a 'business partner' of the LEC on the basis of traffic volumes."[133] Without explanation, Qwest departs from its prior acknowledgement that the FCC should "focus[] on eliminating the impact of a proposed solution on innocent CLECs[] by acknowledging that so-called traffic stimulators should be limited to charging the tariffed rate of the 'nearest non-rural ILEC.'"[134] While Qwest's new proposal may address rural LEC traffic stimulation, it would go much further in limiting the legitimate business arrangements of all LECs, including "innocent CLECs."

AT&T and the Rural Independent Competitive Alliance ("RICA") also go well beyond narrowly tailored rules to include a broad, vague declaratory ruling that it is an unreasonable practice to assess terminating access charges on traffic subject to a revenue sharing "arrange-

[132] *See, e.g., Ex Parte* Letter from William A. Haas, Vice President Regulatory & Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, Docket No. 07-135 (filed June 12, 2008) ("*PAETEC June 12 Ex Parte*").

[133] Qwest Comments at 13.

[134] *Ex Parte* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, FCC, Docket No. 07-135, Attachment, at 1-2 (filed May 21, 2008).

ment."[135] While some of the AT&T/RICA *rule changes* are narrowly drawn to address actual traffic stimulation problems, their joint ex parte contains a final paragraph: "Separate Revenue Sharing Provision," which, like Qwest's recommendation, restricts revenue sharing arrangements in general.[136] Because they go far beyond the admitted source of the problem and would stifle legitimate business arrangements, the FCC should reject these proposals.

No record evidence justifies modifying rules for competitive LECs that do not avail themselves of the rural LEC rate exemption.[137] Indeed, no one has even accused a non-rural CLEC of engaging in traffic pumping schemes. And while AT&T's proposal addresses some of PAETEC's concerns,[138] neither Qwest nor AT&T/RICA have rebutted the substantial record evidence PAETEC and others have submitted to show that revenue sharing prohibitions would have numerous unintended consequences without addressing the root of the purported traffic stimulation problem.

Further, the Qwest and AT&T/RICA proposals would limit certain CLECs' marketing practices, but ignore others largely employed by RBOCs such as customer equipment credits and

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[135] *See Ex Parte* Letter from Brian Benison, Director – Federal Regulatory, AT&T Services, Inc. and Steve Kraskin, Legal Counsel, Rural Independent Competitive Alliance, to Marlene H. Dortch, Secretary, FCC, Docket Nos. 01-92 & 07-135 (filed Nov. 25, 2008). *See also* AT&T at 32-34 (supporting the AT&T/RICA proposal, and supporting a Commission conclusion that sharing of access revenue is an unjust and unreasonable practice for *all* carriers).

[136] *Id*., at Attachment, p. 2 (proposing that the Commission adopt the following language: "It shall be an unjust and unreasonable practice for any LEC to assess terminating interstate switched access charges on traffic that is subject to a revenue sharing arrangement. A 'revenue sharing arrangement' is any arrangement between a LEC and a calling provider whereby (i) the LEC compensates a calling provider to direct calls to or through a LEC's local exchange and (ii) the arrangement can be expected over its term to produce net payments from the LEC to the calling provider. 'Calling provider' means any entity, including any affiliate of a LEC, that promotes or advertises to end users telecommunications services or information services and that provides or uses a LEC's telephone numbers for such services to be routed to or through a LEC's local exchange.").

[137] *See PAETEC June 12 Ex Parte*, at 1.

[138] "Life of the arrangement" has been changed to "term" of the arrangement. *See PAETEC June 12 Ex Parte*, at 3.

subsidies. Given their size and economies of scale, RBOCs are typically better suited to provide customer equipment credits, and have employed such marketing tactics successfully for some time. For example, in one case investigated by the Indiana Utility Regulatory Commission, SBC successfully persuaded a potential Time Warner Telecom customer to choose SBC by offering a $120,000 equipment voucher.[139] If the FCC adopts the RBOC revenue sharing proposal, it would be regulating certain types of carrier marketing incentives but not others (prohibiting those employed by many competitive carriers while leaving RBOC incentives untouched), and would go far beyond the actual traffic stimulation problems that the Commission aims to address.

As PAETEC has demonstrated, revenue sharing is a common business practice in the telecommunications market employed by a number of providers and their business partners in a host of legitimate business arrangements (*e.g*, payphone providers and premises owners, operator service providers, traffic aggregators, etc.).[140] If the Qwest or AT&T/RICA proposals are adopted, they would improperly impede competition by unfairly limiting the ability of CLECs to compete for enterprise customers using the full arsenal of marketing tools that integrated RBOCs could use for their own competitive advantage.[141]

Neither Qwest nor AT&T/RICA provide the details or guidance necessary to implement such broad prohibitions in practice. For example, Qwest's proposed "business partner" definition is overbroad and vague:

> Qwest suggests that the term 'business partner' should include, in addition to the LEC itself or an affiliate of the LEC, 'any entity

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[139] *See, e.g., Complaint of Time Warner Telecom Against Ameritech Indiana Regarding Its Unlawful Market Practice of Issuing Equipment Vouchers in Violation of the Indiana Code and Opportunity Indiana II and Petition for Emergency Suspension of Any and All Ameritech Indiana Equipment Voucher Marketing Practices Pending Commission Investigation*, Order, Cause No. 42236 (I.U.R.C. Sept. 29, 2004).

[140] *See* Joint Commenters Initial Comments at 37-39.

[141] *See PAETEC June 12 Ex Parte*, at 1.

> that pays the LEC no net compensation or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic.[142]

It is not clear whether a BOC wireless affiliate is automatically a "business partner" or qualifies as such only if the BOC "shares" access revenue with the affiliate. What qualifies as "sharing" in the context of affiliates who may or may not document transactions between affiliates? If Qwest's test permits BOCs to share revenue with their CMRS affiliates but prohibit CLECs from sharing revenue with unaffiliated CMRS carriers, such a discriminatory result would disadvantage LECs without a wireless affiliate.[143] Nor does this proposal do anything to address PAETEC's numerous concerns that "net compensation" cannot be easily tracked or measured.[144] The amount of back office work required to initiate such tracking would be a waste of a LEC's limited resources, especially when there is no evidence showing that revenue sharing by non-rural LECs caused the traffic pumping problem.

AT&T's proposed terms are also vague and unworkable. For example, the willingness of a LEC to share revenues with a hotel, university, or other aggregator, does not provide any incentive to the end user customer to place additional calls since the PAETEC customer (e.g. the university) is not placing all the calls in that arrangement.[145] Yet the university may qualify as a "calling provider" under AT&T's definition because it markets telecommunications services to its student population. This is just one example that shows access charge revenue sharing with

[142] Qwest Initial Comments at 13.

[143] *See PAETEC June 12 Ex Parte*, at 4.

[144] In an industry where two carriers typically interact as both purchaser and seller, with interactions amongst a variety of affiliates, for a variety of services, in different geographic markets or regions, a net payment test would provide little utility in accurately and efficiently detecting unreasonable traffic stimulation.

[145] *See, e.g., Access Charge Reform*, Eighth Report and Order, 19 FCC Rcd 9108, 9142-43, ¶ 70 (2004) (noting that the IXCs have failed to demonstrate that commission payments to 8YY generators, such as hotels and universities, translate into incentives for individuals who use those facilities to place excessive or fraudulent 8YY calls).

customers that market telecommunications or information services is not the root cause of the problem. The problem is only manifested where revenue sharing becomes an incentive for portable, high-volume customers to locate in areas with extraordinarily high access charge rates based directly or indirectly on assumed higher costs and lower volumes.[146] Because it targets the wrong factor, any test based on revenue sharing is both under- and over-inclusive. It is therefore unreasonable and ineffective.

Finally, enforcement of the net payor test will rely on the same processes used today: an IXC complains when it sees increased traffic volumes to a particular LEC or, perhaps engage in unlawful self help by withholding payments, triggering a Section 208 complaint or a collection action. In short, the Qwest and AT&T/RICA proposals will require the same administrative resources, investigation and adjudication that the Commission and impacted parties endure today. However, innocent LECs with legitimate revenue sharing arrangements that do not stimulate traffic would also be swept up into unwarranted disputes.

If the Commission takes any action in this proceeding related to traffic stimulation, it should adopt narrow rules that address the actual problem, not blanket restrictions on legitimate business practices employed across the entire telecommunications industry. Because CLECs are capped at the same rate level as the competing ILEC, access charge revenue sharing that creates incentives for a customer to move from one LEC to another within the same territory is harmless to IXCs and end users, and is a legitimate means of promoting competition between LECs. The Commission should not adopt any traffic stimulation measures that rely, implicitly or explicitly, on evaluation of revenue sharing arrangements. Further, the FCC should not dictate how carriers

[146] *See PAETEC June 12 Ex Parte*, at 2.

provide customer incentives or market their services by making one practice (revenue sharing) *per se* unreasonable, while ignoring others (free telecommunications equipment vouchers).

V. CONCLUSION

The Commission should seize this historic opportunity to reach consensus on intercarrier compensation reform and eliminate the artificial and irrational distinctions between classes of carriers and traffic touching the Public Switched Telephone Network ("PSTN") by setting a date certain for each carrier to charge a uniform, forward-looking, cost-based terminating rate. Although the Commission can adopt national rules to govern the transition to the new regime, the Act requires that state commissions determine the interim and final rates.

Respectfully submitted,

/s/

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